Office - Supreme Court, U.S.
FILED
APR 21 1955
HAROLD B. WILLEY, Clerk

NO. 376

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

JOHN P. PETERS, Petitioner

v.

OVETA CULP HOBBY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR RESPONDENTS

HERBERT BROWNELL, JR.,
Attorney General,

WARREN E. BURGER,
WILLIAM F. TOMPKINS,
J. LEE RANKIN,
Assistant Attorneys General,

SAMUEL D. SLADE,
BENJAMIN FORMAN,
Attorneys.
Department of Justice, Washington 25, D.C.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

NO. 376

JOHN P. PETERS, Petitioner

v.

OVETA CULP HOBBY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR RESPONDENTS

---

1. At the close of oral argument, the Chief Justice requested counsel for respondents to file a memorandum with respect to the validity of Regulation 14 of the Loyalty Review Board, which provides that the Board may post-audit and review any determination or decision made by any department or agency loyalty board even though no appeal has been taken. See 5 C.F.R. (1949 ed.) 210.14.[1/] We submit that Regulation 14 was fully authorized by Executive Order 9835.

The Loyalty Review Board was established by Part III, par. 1, of Executive Order 9835 (12 F. R. 1935). Sub-paragraph 1a provides that:

> "The Board shall have authority to review cases involving persons recommended for dismissal on grounds relating to loyalty

---

1/ It should be noted that no question was raised by the pleadings with respect to the validity of Regulation 14. Similarly, this issue was not raised by the petition for a writ of certiorari. In this posture, it was assumed by counsel that this question was not presented for review and, for that reason, there was no occasion to brief it. Cf. Rule 23 (1)(c) of the Rules of this Court; Federal Power Commission v. Colorado Interstate Gas Co., No. 45, this Term, decided March 28, 1955; United States v. Tucker Truck Lines, 344 U. S. 33.

> by the loyalty board of any department or agency and to make advisory recommendations thereon to the head of the employing department or agency. Such cases may be referred to the Board either by the employing department or agency, or by the officer or employee concerned."

Were this the only grant of authority to the Board, perhaps something could be said for the view that Regulation 14 was not authorized by the Executive Order. But cf. Bates v. United States, No. 450 this Term, decided March 28, 1955, where the Court found no difficulty with a comparable construction problem. However, sub-paragraph 1-a does not stand alone. Sub-paragraph 1-b goes on to empower the Board to make "rules and regulations, not inconsistent with the provisions of this order, deemed necessary to implement statutes and Executive orders relating to employee loyalty." In addition, sub-paragraph 1-c directs the Board to "advise all departments and agencies on problems relating to employee loyalty" and to "coordinate the employee loyalty policies and procedures of the several departments and agencies." Regulation 14, we submit, is clearly authorized by this comprehensive delegation of power to the Board. On its face, sub-paragraph 1-a merely prescribes the minimum authority of the Board. It does not purport to limit the review power of the Board to the situations enumerated therein. It does not provide that this enumeration is all inclusive. So read, it does not preclude the Board from reviewing other determinations under the Executive Order where such review is "deemed necessary to implement statutes and Executive orders relating to employee loyalty" in order that the Board might properly carry out its functions to "advise all departments and agencies on all problems relating to employee loyalty" and to "coordinate the employee loyalty policies and procedures of the several departments and agencies."

As we have seen, conformity between the provisions of Executive Order 9835 and Regulation 14 is demonstrated if we resort only to the text of the Executive Order. But in the last analysis, the issue is simply one of Presidential intention. In ascertaining the President's intent in this connection, several factors are significant. To begin with, Regulation 14 was a contemporaneous construction of an executive regulation by the executive agency empowered to administer the regulation. Cf. Bowles v. Seminole Rock Co., 325 U. S. 410, 413-414. Regulation 14, in its original form, was promulgated by the Board at the very inception of the loyalty program. It was part of the first set of regulations issued by the Board on December 17, 1947, and was published in the Federal Register. See 13 F. R. 234. Accordingly, it cannot be assumed that the President and his staff were unaware of Regulation 14. Cf. Federal Crop Insurance Corp. v. Merrill, 332 U. S.380. But we need not rely upon conjecture or legal assumption. The post-audit procedure followed here was not an isolated instance. The Board's practice in this respect under Regulation 14 was given wide publicity and the President was specifically advised by the Civil Service Commission, in its Annual Reports to the President, of its operations under Regulation 14.[2/] Since no disagreement was indicated in the

2/ The Annual Report of the Civil Service Commission for the Fiscal Year Ended June 30, 1948, discloses (p. 10) that by September 30, 1948, a total of 1,107 decisions had already been post-audited. By the end of June 1949, 4,116 cases had been post-audited and in 6 cases during that year the Board had held new hearings under Regulation 14. Id., 1949, p. 37. By June 1950, 7,278 cases had been post-audited and new hearings held in 11 cases. Id., 1950, pp. 33-34. During fiscal year 1951, an additional 2,169 cases were post-audited and review on the merits was scheduled in 15 of those cases. Id., 1951, p. 36. During fiscal year 1952, the Board post-audited 5,335 cases and scheduled review on the merits in 10 of those cases. Id., 1952, p. 56. In the concluding year of the program, an additional 4,744 cases were post-audited and 22 of those cases were scheduled for review on the merits. Id., 1953, p. 31. It should be noted that the above post-audits cover cases closed on interrogatories as well as cases involving hearings and re-examinations following E. O. 10241.

face of this unequivocal action, it necessarily follows that the Board's interpretation of the Executive Order met with the approval of the President.

Further, Executive Order 10450 (18 F. R. 2489) which revoked and superseded Executive Order 9835, as amended, demonstrates Presidential knowledge and approval of Regulation 14. Section 11 of the present Executive Order expressly provides that after the effective date of the Order (i.e., May 27, 1953), the Loyalty Review Board "shall not accept agency findings for review, upon appeal or otherwise." [Emphasis added.] Section 11 also provides that "agency determinations favorable to the officer or employee concerned pending before the Loyalty Review Board on such date shall be acted upon by such Board * * *." These provisions wholly rebut the suggestion that Executive Order 9835 was intended to authorize the Board to review agency determinations only upon the appeal of the employee. They manifest Presidential awareness and approval of the Board's interpretation that review was authorized "upon appeal or otherwise" and that, in particular, the Board had authority to review agency determinations favorable to the employee.[3/]

In our view, the foregoing considerations are dispositive. But mention should also be made of Jason v. Summerfield,

---

3/ As we pointed out during oral argument, Executive Order 10450 did not become effective until May 27, 1953. Accordingly, it was inapplicable to the instant case which was decided by the Loyalty Review Board on May 22, 1953 (R. 8.) It is difficult to see how Executive Order 10450 can be relied upon as a delegation of authority to pass on the instant case. Insofar as the question here is one of Presidential intention, Executive Order 10450 is plainly material since it evidences Presidential knowledge and approval of Regulation 14. Concededly, Executive Order 10450 was issued by a different President. But it is hardly to be suggested that President Eisenhower knew of Regulation 14 and that President Truman had no such knowledge.

214 F. 2d 273 (C.A.D.C.), certiorari denied, 348 U. S. 840, which was cited to the Court during oral argument. In that case, the Loyalty Review Board had, under Executive Order 9835, reversed the finding of the employing agency that reasonable grounds existed for believing that the employee concerned was disloyal. After this clearance, the standard was changed to "reasonable doubt as to the loyalty of the person involved" by Executive Order 10241. Thereafter, the Loyalty Review Board issued Memorandum No. 66, which provided for the re-opening by the employing agency of all cases which had been reversed on appeal or which had been reviewed by the Loyalty Review Board in its post-audit program. Pursuant to Memorandum No. 66, the employee's case was reopened and new hearings were held by the agency and the Loyalty Review Board, both of which resulted in the employee's dismissal. It was contended that the Executive Order did not authorize the reopening of the employee's case. The Court of Appeals rejected this argument, holding that "it is the continuing duty of any department or administrative agency to execute its functions in such fashion as may be required to effectuate its purposes and to accomplish its objectives." 214 F. 2d at 278. Although the facts in Jason are not identical to those involved here, the issue as to power to conduct a post-audit is substantially the same. If sub-paragraph 1-a, Part III, of Executive Order 9835 (supra, p. 1) be read as limiting the Board's power to review of unfavorable decisions, the Board had no power to reopen a determination favorable to the employee. But as we have shown above, and as the Court of Appeals recognized in Jason, Executive Order 9835 did not so limit the Board's authority.

In short, whether resort be had to textual analysis alone, to "legislative" history, or to judicial decision, it is difficult to see how there can be any question with

respect to the validity of Regulation 14 of the Loyalty Review Board. 4/

2. At the close of oral argument, the Chief Justice recalled counsel for respondents and requested him to clarify counsel's earlier statements with respect to the availability to the Court of the record herein. It is apparent that the confusion may have inadvertently resulted from colloquies with the Court in which the word "record" was employed in three senses by as many members of the Court. The first sense, of course, is the Record in this litigation which is presently before the Court, consisting of 29 printed pages of the pleadings, motions, stipulations of counsel, and actions of the courts below. The second sense in which the word "record" was used is the administrative record of the Board which was made available to petitioner. This record comprises the charges against petitioner, petitioner's reply to the charges, the summary of information furnished to petitioner by the employing agency prior to the hearing, the transcripts of the hearings

4/ As we understand the import of the Court's inquiry on this score, the Court has in mind its oft-repeated rule that constitutional questions should not be decided in advance of the necessity for doing so. But we question whether a limited construction of Executive Order 9835 as to the scope of review power of the Loyalty Review Board would provide any genuine disposition of this controversy. If the case were now to be remanded on this technical issue, further administrative handling, if any were possible, would probably be controlled by Executive Order 10450 with its sharply differing standards and procedures. On the assumption that loyalty boards and procedures under Executive Order 9835 would be available on remand, a decision here that the Loyalty Review Board had no authority to post-audit petitioner's case would leave standing the favorable determination of the agency board. However, under Executive Order 9835, that determination is not final. The order vests personal responsibility in the head of the employing department or agency. Accordingly, on remand, there would be a recommendation but no decision outstanding as to petitioner's loyalty and the Secretary of Health, Education and Welfare would presumably have to reach a final result on all the factors available for her consideration. There is nothing to indicate that the conclusion reached by the Secretary would necessarily be favorable to petitioner. An unfavorable decision would, of course, raise the same constitutional issues which are here presented for decision.

before the agency loyalty board and the Loyalty Review Board, affidavits and letters, and other documentary exhibits introduced during those hearings. It is this record which the Government is free to furnish to the Court with petitioner's consent.[5/] The third sense in which the word "record" was employed covers the total record considered by the Board, i.e., the foregoing "record" and all investigative agency reports in the possession of the loyalty boards.[6/] It is this latter material--the investigative agency reports--which is not available under the 1948 Presidential directive.

In this connection, we think it appropriate to point out that making these investigative agency reports available to the Court would not resolve the issues brought to this Court by petitioner. The central issue is not whether this

---

5/ In this connection, we should like to clarify an answer given by counsel to an inquiry from the bench as to the contents of the "record" before the Loyalty Review Board in comparison with the record before the agency board. Counsel for the Government stated that the Court was correct in assuming that the Review Board had nothing before it that was not before the agency board except for the additional witnesses called by petitioner. This statement is correct. However, it should be pointed out that the transcripts of the two hearings differ in that petitioner was subjected to a more intensive examination and cross-examination with respect to his membership in, affiliation with, or sponsorship of specifically named organizations on the Attorney General's list and his motives for such activities on his part. Whether examination of the record of the Loyalty Review Board would be of assistance to the Court is, of course, for the Court to determine. In this connection, it is our understanding that the Court's rules would not require printing of the record in any case, so that no additional expense would be imposed on anyone.

6/ "Record" in this third sense consists of "all the evidence" on which loyalty determinations were to be made. In addition to the material set forth in our brief to demonstrate that "all the evidence" consists of no less than this full record, any suggestion that Executive Order 9835 intended the words "all the evidence" to call for names or personal testimony of confidential informants is flatly refuted by the Order itself in those provisions of Part IV, §2, reading: "...the investigative agency may refuse to disclose the names of confidential informants, provided" it furnishes certain stipulated alternative information about the informants. The Board was thus the judge of the sufficiency of the reasons for withholding names and the Regulations permitted them to call for added information or the production of the investigative agents to develop this inquiry. The extent and manner in which boards exercised this power and what standards of sufficiency were established was a matter of administrative experience.

Court, or the courts below, would have reached the same result as the Loyalty Review Board on the basis of the information before that Board. Petitioner's claim is that he was entitled to confront and cross-examine the confidential informants whose information was summarized in those reports. Judicial evaluation of the Board's evaluation of such information, and of the sufficiency of the reasons for withholding the identity of informants, would be no substitute for the rights claimed by petitioner under the Due Process Clause. Where due process requires disclosure its standard cannot be satisfied by an ex parte examination by the Court sitting in camera. It is, of course, our firm conviction that due process in the context of this case and the constitutional problem here presented, does not require disclosure and confrontation. If we be correct in our position and the reasons for it (see e.g., our Brief, pp. 62-66, 102-106), then in camera review would be improper.[7] That we are correct is, we believe, demonstrated by precedent and analysis, fully covered in our brief and in no way refuted by anything adduced on petitioner's behalf. It is crucial that such precedent and analysis be followed and applied and not be blurred by other considerations. As Mr. Justice Holmes observed in Northern Securities Co. v. United States, 193 U. S. 197, 400-401 (quoted with approval in a concurring opinion in Dennis v. United States, 341 U. S. 494, 528): "Great cases, like hard cases, make bad law. For great cases are called great, not by reason of their

---

7/ "It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret. Nor can courts sit in camera in order to be taken into executive confidences. * * * [such decisions] are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry." C. & S. Air Lines v. Waterman Corp., 333 U. S. 103, 111.

real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend."

Finally, the statement of Government counsel that he had seen part of the reports also requires clarification in the light of subsequent questions. Counsel did not suggest or intend to indicate at any point that he had seen the "raw" files which had not been made available to the loyalty boards. Counsel meant only that he had seen some but not all of the investigative agency reports which had been in the possession of the loyalty boards. Accordingly, there is no question involved here of information being made available to counsel which was not made available to the loyalty boards. Nor is it correct that cabinet officers cannot see FBI reports. They do receive the same reports as the boards but not the names of confidential informants. 8/

8/ Parenthetically, it should be noted that there is no basis for the suggestion of a member of the Court that "underlings" in the investigative agencies are empowered to decide who is to be trusted with the identity of the confidential informants. No question of trust or reliability is involved. No one suggests that the members of the Loyalty Review Board or the Judiciary are not to be trusted with such information. The identity of confidential informants is withheld solely because the information obtained from such informants is obtained under a pledge of confidence or where the source is an undercover agent of the FBI. Necessarily, if the pledge of confidence is breached, these sources of information would dry up. It has been suggested that if relevant information can be obtained only by faithfully observing a pledge of confidence, the Government should not utilize such sources of information. It would be intolerable indeed, if, observing this suggested standard of Executive operations, a case arose where the sole proof of disloyalty was obtained by an undercover FBI agent engaged in other vital work with a subversive group. Can it be seriously urged that the FBI not give such confidential information to another branch of the Government as an alternative to producing the agent in a hearing--thus destroying extensive counter-espionage work of that agent? In our view the Constitution does not require this choice, and the national security calls for an exactly contrary conclusion.

3. After counsel for respondents had been recalled by the Chief Justice at the end of oral argument, Mr. Justice Frankfurter asked counsel to advise the Court whether there was a regulation issued in 1952 by the Civil Service Commission explaining that the President's directive is not a restriction upon the availability of personnel records at the request of any agency or the Judicial Branch of the Government. Presumably, Mr. Justice Frankfurter had reference to Memorandum No. 45, Revised, Supplement No. 1, dated August 22, 1952. This Memorandum provides that personnel records may be furnished to agencies of the Legislative Branch, the Judicial Branch, or the District of Columbia where "the records are requested solely in connection with the appointment or transfer of personnel presently or formerly employed within the Executive Branch," and where "as to such personnel the requesting agency agrees to comply with the terms and provisions of the above-cited letter of the President and with the regulations of the Loyalty Review Board regarding the furnishing of information on loyalty matters." Since petitioner is not being considered for appointment by the Judicial Branch of the Government, this Memorandum has no applicability. For the convenience of the Court, the text of the Memorandum is set forth in the appendix, infra, pp. 11-12.

Respectfully submitted,

HERBERT BROWNELL, JR.,
Attorney General,

WARREN E. BURGER,
WILLIAM F. TOMPKINS,
J. LEE RANKIN,
Assistant Attorneys General,

SAMUEL D. SLADE,
BENJAMIN FORMAN,
Attorneys.
Department of Justice, Washington 25, D.C.

APPENDIX

UNITED STATES CIVIL SERVICE COMMISSION
WASHINGTON 25, D.C.

August 22, 1952

MEMORANDUM NO. 45, REVISED, SUPPLEMENT NO. 1

TO ALL EXECUTIVE DEPARTMENTS AND AGENCIES

SUBJECT: Information which may be furnished by Government agencies with regard to loyalty matters under Executive Order 9835, as amended.

A question has been raised as to whether the instructions in the President's letter of April 3, 1952, to the Secretary of State and Memorandum No. 45, Revised, prohibit the release of Official Personnel Folders containing the results of proceedings under Executive Order 9835 to agencies of the (1) Legislative Branch, or (2) the Judicial Branch, or (3) the District of Columbia when such agencies appoint former employees of the Executive Branch.

Such agencies may be given access to the personnel records of agencies of the Executive Branch provided:

(a) that the records are requested solely in connection with the appointment or transfer of personnel presently or formerly employed within the Executive Branch, and

(b) that as to such personnel the requesting agency agrees to comply with the terms and provisions of the above-cited letter of the President and with the regulations of the Loyalty Review Board regarding the furnishing of information on loyalty matters.

When an agency of the Legislative Branch, the Judicial Branch, or the District of Columbia requests the personnel record of an employee or former employee

of the Executive Branch, the agency receiving the request shall furnish to the requesting agency a copy of Loyalty Review Board Memorandum No. 45, Revised, and its attachment, a copy of the President's letter of April 3, 1952 to the Secretary of State. Copies of the memorandum and the letter will be furnished upon request by the Loyalty Review Board for this purpose.

The agency of the Executive Branch receiving the request for the personnel record shall obtain a statement signed by the head of the requesting agency, or by a person designated by such head, to the effect that the personnel record is requested solely in connection with the appointment of the individual involved and that they agree to comply with the terms and provisions of the President's letter of April 3, 1952, to the Secretary of State and Loyalty Review Board Memorandum No. 45, Revised, to all Executive Departments and Agencies, regarding the furnishing of information on loyalty matters. Upon receipt of such a statement, the personnel record may be released.

/s/ Burton L. French

Burton L. French
Acting Chairman
Loyalty Review Board

CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of April, 1955, I served a copy of this supplemental memorandum on counsel for the petition by mailing a copy thereof first-class mail to:

Arnold, Fortas & Porter
1229 - 19th St., N. W.
Washington, D. C.

WARREN E. BURGER
Assistant Attorney General